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SUPREME COURT, U.S.

No. 07-395
(Application No. 07A252)
CAPITAL CASE

In the
SUPREME COURT OF THE UNITED STATES

THOMAS D. ARTHUR,

Petitioner,

v.

RICHARD F. ALLEN, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO CERTIORARI AND ACCOMPANYING APPLICATION FOR STAY OF EXECUTION

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QUESTIONS PRESENTED
(Restated)

1. On this particular record, is there any basis for second-guessing the district court's factual findings, expressly adopted by the Eleventh Circuit, (1) that Arthur delayed unreasonably and unjustifiably in filing his § 1983 method-of-execution challenge and (2) that, by virtue of that delay, Arthur's lawsuit was not "brought at such a time as to allow for consideration of the merits without requiring entry of a stay" within the meaning of Nelson v. Campbell, 541 U.S. 637, 650 (2004), and Hill v. McDonough, 126 S. Ct. 2096 (2006)?

2. On this particular record, is there any basis for concluding that the lower courts abused their discretion, see Bowersox v. Williams, 517 U.S. 345, 346 (1996), by declining to stay the execution of a capital murderer who filed his lethal injection lawsuit with unreasonable delay, a conclusion supported by the fact that Arthur filed his lawsuit: (a) approximately five years after Alabama adopted lethal injection, (b) almost 10 months after other Alabama death row inmates began filing lethal-injection challenges, (c) after this Court denied certiorari from federal habeas review, (d) after the State of Alabama moved for an execution date, and (e) when Arthur was in the shadow of an execution date?

3. Whether this Court should grant certiorari to address an alleged circuit split when no such split exists, as evidenced by the relevant court of appeals consistently applying the "timeliness" requirement articulated in Nelson and Hill?

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INTRODUCTION

This Court has faced virtually the same set of circumstances presented in this case in recent cases in the last five months involving Alabama death-row inmates: Aaron Jones, Darrell Grayson, and Luther Williams. Indeed, Grayson and Williams filed virtually identical petitions for certiorari, and Arthur's is almost identical to those. All of these inmates filed a § 1983 action challenging Alabama's method-of-execution upon the conclusion of habeas corpus proceedings – typically, this Court's denial of certiorari. The plaintiff inmates, including Arthur, do not offer legitimate reasons for waiting to file their lethal-injection challenge. It is obvious that their late-filed claims have more to do with delaying an execution than it does seeking an alteration in Alabama's execution protocol. This Court denied equitable relief in those cases and should do the same here.

Arthur's § 1983 complaint primarily asserts that there is a risk that the inmate is not sufficiently anesthetized and as a result suffers excruciating pain when the potassium chloride is administered.[1] Complaint at ¶¶24-25. The complaint does not specifically state how this event could occur. To be frank, this allegation is nonsense, and courts have said so. In rejecting this assertion, a federal district judge in Virginia stated as follows:

> Plaintiff argues that the sodium thiopental may not be properly administered to him before the potassium chloride is administered and takes effect. If this happened, Plaintiff would feel a great deal

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[1] As a sub-part of this theory, Arthur's complaint states that pancuronium bromide (pavulon) acts to paralyze the inmate, thus not allowing the insufficiently-anesthetized inmate to exhibit pain. Complaint at ¶23.

> of pain. For this to occur, the sodium thiopental would fail to enter the bloodstream, but the potassium would enter his bloodstream. This outcome cannot reasonably be expected because all three drugs are administered through the same IV lines. Plaintiff's argument relies upon an accident or mistake, not a reasonably foreseeable problem with the protocol.

Walker v. Johnson, 448 F.Supp.2d 719, 723 (E.D. Va. 2006). For Arthur's scenario as described in his complaint to occur, sodium thiopental would not be delivered into the bloodstream, but then (as if by magic) the doses of pancuronium bromide and potassium chloride would be delivered, through the very same line, through the inmate's bloodstream.

STATEMENT OF THE CASE[2]

Arthur is traveling what is now becoming a well-traveled route: filing a lethal-injection challenge pursuant to 42 U.S.C. § 1983 at the conclusion of federal habeas proceedings. The district court dismissed Arthur's complaint because: (1) Arthur unreasonably delayed in filing his § 1983 action, and (2) solely due to that delay the merits could not be litigated without the entry of a stay of execution. (The district court's order can be found at pages A1-A13 in Arthur's appendix to the petition.) The Eleventh Circuit affirmed; ruling that the district court did not abuse its discretion in dismissing Arthur's § 1983 action due to laches, especially given the strong presumption against the grant of equitable relief. (The

[2] This brief responds both to Arthur's petition for certiorari and to the motion for a stay of execution.

Eleventh Circuit's opinion can be found at pages A14-A23 in Arthur's appendix to the petition.)

A. Chronology of Relevant Events

Arthur was originally convicted in 1982 for the capital offense of murdering Troy Wicker after having been convicted of a previous murder within 20 years preceding the instant murder. See Ala. Code § 13A-5-40(a)(13)(2006 Replacement Volume). Arthur has been on Alabama's Death Row for approximately 16 years after being convicted for capital murder and sentenced to death in 1992 (for the third time). Arthur v. State, 711 So. 2d 1031 (Ala. Crim. App. 1996); Ex parte Arthur, 711 So. 2d 1097 (Ala. 1997). Arthur exhausted his state and federal appeals when this Court denied certiorari review on April 16, 2007. Arthur v. Allen, __ U.S. __, 127 S.Ct. 2033 (Apr. 16, 2007). It was at that point, out of appeals and facing execution, that Arthur filed a § 1983 action challenging Alabama's execution procedures. See Doc. 1 (filed on May 14, 2007).[3] Arthur's complaint does not contain any statement regarding why he waited to file his § 1983 lawsuit until his federal habeas challenge ended and the State had sought an execution date.

B. Arthur's § 1983 Action

On May 14, 2007, Arthur filed a § 1983 action alleging that Alabama's execution procedures are unconstitutional under the Eighth and Fourteenth Amendments. See Doc. 1. In his complaint, Arthur seeks an injunction barring

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[3] On April 12, 2007, Arthur filed a § 1983 action requesting, among other things, that DNA testing be performed on several items. This complaint was dismissed by District Judge Keith Watkins on August 17, 2007, and affirmed by the Eleventh Circuit. See Arthur v. King, 2007 WL 2381992 (M.D. Ala. Aug. 17, 2007), aff'd, __ F.3d __, 2007 WL 2744884 (11th Cir. Sept. 21, 2007).

the Alabama Department of Corrections from executing him with inadequate anesthesia and execution procedures that violate the Eighth Amendment's prohibition against cruel and unusual punishment. Id. He also seeks a declaratory judgment that Alabama's execution procedures violate that prohibition. Id. Arthur filed his complaint almost five years after the method of execution of his sentence changed by operation of law to lethal injection. See Ala. Code § 15-18-82.1 (2006 Cumulative Supplement) (Alabama law establishing lethal injection as the primary method of execution became effective on July 1, 2002). Arthur's complaint was filed after the conclusion of his federal habeas proceeding, see Arthur v. Allen, 127 S.Ct. 2033 (Apr. 16, 2007), and after the State, on April 17, 2007, moved for the Alabama Supreme Court to set an execution date, see Doc. 1 (complaint)(filed on May 14, 2007).

Because Arthur unjustifiably delayed in filing this lawsuit, the defendants (hereinafter "the State") moved to dismiss it on laches and statute-of-limitations grounds.[4] Doc. 15. In granting the State's motion, the district court decided two questions against Arthur. "The initial question ... is whether the plaintiff 'unreasonably delayed' in filing this action." Arthur v. Allen, 2007 WL 2320069 at *2 (S.D. Ala. Aug. 10, 2007). The district court ruled that Arthur "unreasonably delayed in filing this action" and that the delay was inexcusable. Id. at *2-4. "The second question that must be answered in determining if a strong presumption against a stay should be applied is whether the plaintiff's claim could have been brought at such a time as to allow consideration of the

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[4] The district court did not address whether Arthur's complaint was time-barred by the statute of limitations. Arthur, 2007 WL 2320069 at *1 (A3).

merits without requiring entry of a stay." Id. at *4 (punctuation omitted). Because Arthur offered no valid reason why his claim could not have been brought sooner, the district court correctly ruled that "[t]he equitable pendulum thus swings even further away from the plaintiff." Id. at *4. In answering these questions, the district court applied binding precedent from the Eleventh Circuit. See Grayson v. Allen, 2007 WL 2027903 (11th Cir.), cert. denied, 2007 WL 2086662 (2007); Jones v. Allen, 485 F.3d 635 (11th Cir), cert. denied, 127 S.Ct. 2160 (2007), Rutherford v. McDonough, 466 F.3d 970 (11th Cir.), cert. denied, 127 S.Ct. 465 (2006); Hill v. McDonough, 464 F.3d 1256 (11th Cir. 2006), cert. denied, 127 S.Ct. 465 (2006); Williams v. Allen, __ F.3d __, 2007 WL 2368028 (11th Cir. Aug. 21, 2007), stay denied, 2007 WL 2398491 (Aug. 23, 2007).

The Eleventh Circuit affirmed the district court's dismissal of Arthur's lethal-injection challenge. The Eleventh Circuit ruled that "[i]n considering the dismissal of a lethal injection challenge, courts are to apply equitable principles which mandate dismissal when the plaintiff 'delayed unnecessarily in bringing the claim, ... knowing full well that the discovery, evidentiary hearing, and decision on the merits that he demands could not possibly be accomplished' within the short period of time between filing and the scheduled execution date." Arthur at A19 (quoting Rutherford v. McDonough, 466 F.3d 970 (11th Cir. 2006)(quoting Hill, __ U.S. at __, 126 S. Ct. at 2104)). The Eleventh Circuit then held that the balance of the equities tilts against Arthur because, among other reasons, "Arthur was on notice that a challenge to Alabama's method-of-execution was available under § 1983 as early as June 2006, as a result of the Supreme Court's decision in Hill, or August 2006, as a result of other filed Alabama actions." Arthur at A22-A23.

The procedural history of this case demonstrates that Arthur has not sought to expedite this case. After filing the § 1983 action, Arthur made no filings other than a court-ordered response to the State's motion to dismiss. Arthur did not seek any discovery nor did he request that the case be expedited. Arthur did not submit any evidentiary submissions in an effort to demonstrate a likelihood of success on the merits. Thus, any contention by Arthur that the district court has not addressed the merits of his complaint is undermined by the fact that no evidentiary submission was presented.

The State recognizes that issues surrounding the death penalty carry much emotion. The State also agrees that executions should be performed in a constitutional manner (which it does). Even though Arthur did not present any evidence to the district court, another district court has addressed the merits of a lethal-injection challenge against Alabama's protocol on the basis of an evidentiary submission that the court stated was "substantial." Grayson v. Allen, __ F.Supp.2d __, 2007 WL 1491009 at *12 (May 21, 2007 M.D. Ala.), aff'd, Grayson v. Allen, 491 F.3d 1318 (July 16, 2007), cert. denied, Grayson v. Allen, __ S.Ct. __, 2007 WL 2086662 (July 26, 2007). In evaluating Grayson's evidentiary submission that included an affidavit from an expert witness, the district court ruled that "Grayson cannot show a likelihood of success on the merits, much less a significant likelihood." Grayson, 2007 WL 1491009 at *12. In particular, the district court stated the following:

> What the evidence does not establish is relevant to this analysis: (1) any execution 'mishap' in an Alabama lethal injection execution; (2) any cruel or unusual pain suffered by an inmate in an Alabama lethal injection execution; (3) any mishap in the

> delivery or injection of the three-drug mix in Alabama; or (4) any other compelling reason that suggests a substantial risk of cruel and unusual pain in future lethal injection executions in Alabama. Grayson's arguments, and the evidence upon which they are based, do not establish a significant likelihood of success on the merits.

Grayson, 2007 WL 1491009 at *12 (emphasis in original). Finally, the district court in Grayson found that "[t]he absence of evidence of a mishap, or even the risk of something more than negligence, not only controverts Grayson's claim, but it also significantly diminishes the probative value of training and procedural deficiencies that he alleges exist in Alabama's system." Id.

REASONS FOR DENYING THE WRIT AND THE ACCOMPANYING STAY REQUEST

I. THERE IS NO BASIS FOR SECOND-GUESSING THE LOWER COURTS' FACT-BOUND DETERMINATION THAT, ON THIS RECORD, ARTHUR UNREASONABLY DELAYED IN FILING HIS § 1983 ACTION AND THAT HIS DELAY WOULD MAKE IT IMPOSSIBLE TO ADJUDICATE HIS CHALLENGE FULLY AND FAIRLY WITHOUT A STAY

The Eleventh Circuit, in this case and in other recent decisions, has correctly applied the holdings of this Court in determining whether an inmate is entitled to a stay of execution when he files his lethal-injection with unjustifiable delay. This Court has stated that "[a] court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow

consideration of the merits without requiring entry of a stay.'" Hill v. McDonough, __ U.S. __, 126 S.Ct. 2096, 2104 (2006) (quoting Nelson v. Campbell, 541 U.S. 637, 650, 124 S.Ct. 2117, 2126 (2004)). The Eleventh Circuit, in this case and in other recent decisions, has made this paramount inquiry in deciding whether to grant equitable relief. Thus, the standard of "timeliness" that Arthur seeks to be defined has already been articulated by this Court in Nelson and Hill.[5] Arthur's petition also requests this Court to reassess the highly fact-specific considerations that led the courts below to deny equitable relief in the particular circumstances presented by this case. Such a request for what can only be understood as pure fact-bound, error-correction is, as a rule, an insufficient basis for certiorari. See Sup. Ct. R. 10; R. Stern, E. Gressman, et al., Supreme Court Practice § 4.14, at 249 (8th ed. 2002). That is particularly true where, as here, a petitioner asks this Court to second-guess lower courts' determinations of their own ability to fairly and properly adjudicate a case in a particular timeframe, as well as those courts' management of their own dockets.

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[5] Arthur criticizes the Eleventh Circuit for not "clarifying the proper standard for determining the timeliness of a lethal injection challenge, holding only that actions are untimely when filed 'too late to allow for a full adjudication of the merits of [a plaintiff's] action.'" Pet. at 10. However, the Eleventh Circuit was applying the standard for timeliness that this Court articulated in Nelson, 541 U.S. at 650, and Hill, 126 S. Ct. at 2104. That timeliness standard is clear on its face and needs no further explication.

A. The Eleventh Circuit, In This Case And Others, Faithfully Applies Nelson and Hill In Deciding Whether An Inmate Is Entitled To A Stay of Execution

The Eleventh Circuit concluded that Arthur's unreasonable and unexcused delay in waiting until late in the litigation day to file his § 1983 lethal-injection challenge disentitled him from equitable relief, see Arthur, A17-A23, which is all the relief Arthur was seeking. The Court further determined that "the equitable principles at issue when inmates facing imminent execution delay in raising their § 1983 method-of-execution challenges are equally applicable to requests for both stays and injunctive relief." Arthur at A18 (quoting Williams v. Allen, __ F.3d __, 2007 WL 2368028 at *2 (11th Cir. 2007)(quoting Grayson, 491 F.3d at 1322, cert. denied, 2007 WL 2086662 (July 26, 2007).

The law applied by the Eleventh Circuit is discussed in Nelson. There, this Court explained why its decision in that case would not "open the floodgates to all manner of method-of-execution challenges, as well as last minute stay requests." See Nelson, 541 U.S. at 649. In that explanation, this Court discussed its earlier decision in Gomez v. United States Dist. Court for N. Dist. of Cal., 503 U.S. 653 (1992), which had vacated a stay of execution entered by the federal appeals court in a § 1983 lawsuit challenging the method of execution, even though the Court recognized that the claim may have been cognizable under § 1983. The reason this Court had concluded that the inmate was not entitled to a stay of execution in Gomez is that he had "waited until the 11th hour to file his challenge despite the fact that California's method of execution had been in place for years." Nelson, 541 U.S. at 649.

This Court reiterated in Hill what it said in Nelson, 541 U.S. at 649-50, about a stay of execution being an equitable remedy, not available as a matter of right, and that federal courts considering a stay request must be "sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." Hill, 126 S.Ct. at 2104. The equitable principles articulated by this Court and applied by the Eleventh Circuit are:

> (1) 'sensitivity to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts,' (2) the plaintiff's satisfaction of 'all of the requirements for a stay, including a showing of a significant possibility of success on the merits,' (3) the application of 'a strong equitable presumption against the grant of a stay where the claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay,' and (4) protection of the 'States from dilatory or speculative suits.'

Arthur, at A18 (quoting Hill v. McDonough, __ U.S. __, __, 126 s.Ct. 2096, 2104 (2006)(quoting Nelson v. Cambell, 541 U.S. 637, 649-50, 124 S. Ct. 2117, 2126). In Hill, this Court cited to opinions from a number of federal courts that had exercised their equitable powers to dismiss this type of lawsuit on grounds that the claim about the lethal injection procedures and protocol was too speculative or had been filed too late. Id. at 2104 (citing Hicks v. Taft, 431 F.3d 916 (6th Cir. 2005); White v. Johnson, 429 F.3d 572 (5th Cir. 2005); Boyd v. Beck, 404 F.Supp.2d 879 (E.D. N.C. 2005)). Although not passing judgment on those decisions, this Court did say that "federal courts can

and should protect States from dilatory and speculative suits." Id.

In denying equitable relief to Arthur, the Eleventh Circuit correctly applied this Court's precedent. The Court properly ruled that "courts are to apply equitable principles which mandate dismissal when the plaintiff 'delayed unnecessarily in bringing the claim, ... knowing full well that the discovery, evidentiary hearing, and decision on the merits that he demands could not possibly be accomplished' within the short period of time between filing and the scheduled execution date. Arthur at A19 (quoting Rutherford, 466 F.3d at 974) (also citing and quoting Hill, __ U.S. at __, 126 S. Ct. at 2104). Thus, the Eleventh Circuit concluded that the district court did not abuse its discretion in dismissing Arthur's § 1983 action due to his unnecessary delay, especially given the strong presumption against the grant of equitable relief. Arthur, at A19-A23.

B. The Eleventh Circuit's Fact-Bound Determination That Arthur Unjustifiably Delayed In Filing His Lethal-Injection Lawsuit Does Not Warrant Certiorari Review

Contrary to Arthur's assertion, the Eleventh Circuit addressed the "particularized facts" in rejecting Arthur's lethal-injection challenge. Arthur at A19-A23. Despite acknowledging that a "number of Alabama cases were filed in the summer and fall of 2006" alleging that Alabama's execution procedures were unconstitutional, Arthur waited until May 14, 2007, to file his lethal-injection claim. Arthur at A20. Further, "Arthur did not file his § 1983 action until almost 16 months after the Supreme Court granted certiorari in Hill v. Crosby, 546 U.S. 1158, 126 S. Ct. 1189 (2006), and almost 11 months after the Supreme Court clarified in Hill that inmates could file § 1983 challenges to a state's execution

procedures." Arthur at A21. Finally, the Eleventh Circuit noted that Arthur filed his late-filed claim "nine months after we had denied relief in his federal habeas action in August 2006." Arthur at A21-22. Arthur has never offered any legitimate reason why he waited until he was in the shadow of an execution date before he filed a lethal-injection challenge. The Eleventh Circuit ultimately concluded that "the district court did not abuse its discretion in dismissing Arthur's § 1983 action due to laches, especially given the strong presumption against the grant of equitable relief." Arthur at A23.

If Arthur had filed this lawsuit at such a time that "his claim could have been resolved on the merits without impacting his scheduled execution date" then his case would have been allowed to proceed. Arthur, 2007 WL 2320069 at *4. In Hill v. McDonough, 464 F.3d 1256, 1259 (11th Cir. 2006), cert. denied, 127 S. Ct. 465 (2006), and Rutherford v. McDonough, 466 F.3d 970, 973-74 (11th Cir.), cert. denied, 127 S. Ct. 465 (2006), and Diaz v. McDonough, 472 F.3d 849, 851 (11th Cir. 2006), cert. denied, 127 S. Ct. 851 (2006), and Jones v. Allen, 485 F.3d 635, 639 n.2 (11th Cir.), cert. denied, 127 S. Ct. 2160 (2007), and Grayson v. Allen, 491 F.3d 1318, 1326 (11th Cir. 2007, cert. denied, 2007 WL 2086662 (2007), and Williams v. Allen, __ F.3d __, 2007 WL 2368028 at *3 (11th Cir. 2007), stay denied, 2007 WL 2398491 (2007), the Eleventh Circuit ruled that the balance of the equities tips against the inmate if the claim could have been brought in time to permit full consideration of it without the need to stay the execution. Similarly, "[t]here was no justification for Arthur's failure to bring his lethal injection challenge earlier to allow sufficient time for full adjudication on the merits of this claim." Arthur at A23.

II. THE RELEVANT COURT OF APPEALS ALL CONSISTENTLY APPLY THIS COURT'S "TIMELINESS" REQUIREMENT ARTICULATED IN NELSON AND HILL

Arthur hopes to catch this Court's eye by alleging a circuit split. Pet. at 9-15. If a circuit split actually existed, of course, Arthur's tack would have been a reasonable one. See Sup. Ct. R. 10 (a). But none does. There is no circuit split regarding which "timeliness" requirement to employ in the stay context. This issue, verbatim as best we can tell, has now been raised to this Court several times in the last few months. See Grayson v. Allen, 07-5457, "Petition for Writ of Certiorari," pp. 7-14; Williams v. Allen, 07-6034. This Court denied certiorari, see Grayson v. Allen, 2007 WL 2086662 (July 26, 2007), and denied the stay in Williams, and should do likewise here.

Arthur makes two arguments to support his contention that a circuit split exists. First, Arthur alleges that the Fifth, Eighth, and Eleventh Circuits use an "unreasonable delay" requirement while the Ninth Circuit employs a "fact-specific inquiry." Pet. at 9-13. Second, Arthur contends that the Sixth Circuit ignores "equitable standards" and has adopted a statute-of-limitations rule. Pet. at 13-15. The State addresses each of these items in turn.

A. Arthur's Contention That The Ninth Circuit Does Not Employ A "Timeliness" Standard Is Incorrect

Arthur's petition contends a § 1983 lethal-injection challenge, even one that is filed with delay, will be adjudicated on the merits in the Ninth Circuit, but not in the Fifth, Sixth, Eighth, and Eleventh Circuits. As the following will demonstrate, Arthur is wrong.

In Beardslee v. Woodford, 395 F.3d 1064 (9th Cir. 2005), the very case mentioned in Arthur's petition, the Ninth Circuit applied a "timeliness" inquiry to deny a stay of execution. Id. at 1069-70. In fact, the Court stated: "To be sure, as the Supreme Court has instructed in Nelson and Gomez, the district court is entitled to take delay into consideration in exercising its equitable powers." Id. at 1069. The Beardslee Court did rule that the district court erred by applying a "general rule that a claim was dilatory if first filed at the time when the possibility of execution became imminent." Id. at 1070. Instead, courts should conduct "a fact-specific inquiry to ascertain whether the claims could have been brought earlier, and whether the petitioner had good cause for delay." Id.[6] In addition, in Cooper v. Rimmer, 379 F.3d 1029, 1032 (9th Cir. 2004), the Court affirmed the denial of a stay of execution because of "undue delay." Thus, the Ninth Circuit applies the same timeliness inquiry that was applied by the lower courts in this case.

Thus, contrary to Arthur's argument, the Ninth Circuit applies the same "timeliness" standard employed by the other courts of appeals to have addressed this issue. To be sure, the Eleventh Circuit and the district court did make findings, i.e., a "fact-specific inquiry," to demonstrate that Arthur could have raised his claim sooner and that his delay was unjustifiable. Arthur, A3-A10 (district court); Arthur, A19-A23 (Eleventh Circuit). Thus, there is no circuit split with the Ninth Circuit and this Court should deny certiorari and deny the stay application.

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[6] The Beardslee Court, despite stating that a "fact-specific inquiry to ascertain whether the claims could have been brought earlier [] and whether the petitioner had good cause for the delay," see Beardslee at 1070, engaged in no such inquiry.

B. This Court Should Not Grant Certiorari Because The Sixth Circuit Has Time-Barred a Lethal-Injection Challenge Based On The Statute of Limitations

The district court in this case did not address the State's motion to dismiss Williams's complaint on statute-of-limitations grounds. See Arthur at A3. The State did not raise the statute-of-limitations issue in its Eleventh Circuit brief. It is unclear why Arthur believes that certiorari should be granted on an issue that was not addressed by the district court and not raised in the Eleventh Circuit.

Recently, the Sixth Circuit, in Cooey v. Strickland, determined that a death row inmate's § 1983 method-of-execution challenge accrues for statute-of-limitation purposes at the conclusion of direct review – when the sentence becomes final – or when the State elects lethal injection as its method of execution. Cooey v. Strickland, 479 F.3d 412, 422 (6th Cir. March 2, 2007), rehearing denied, Cooey v. Strickland, __ F.3d __, 2007 WL 1574663 (6th Cir. June 1, 2007).[7] The Cooey case appears to be the only reported decision of a federal appeals court addressing the issue of when a death-row inmate's § 1983 method-of-execution challenge accrues for statue of limitation purposes. In a recent case, the Sixth Circuit applied the "timeliness" inquiry articulated in Nelson and Hill in denying a stay of execution. Workman v. Bredesen, 486 F.3d 896, 911 (6th Cir. 2007). The Court further stated that the claim was time-barred under either the majority or dissent's analysis in Cooey. Id. Thus, the Sixth Circuit did not have to apply the equitable standard used here.

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[7] A petition for certiorari filed by the plaintiff inmate in Cooey is pending. Cooey v. Strickland, 07-6234.

As previously stated, the district court did not address the statute-of-limitations issue and it was not raised in the Eleventh Circuit. Thus, the statute of limitations issue is not presented in this case and is not a reason for this Court to grant certiorari.

III. THIS COURT HAS REJECTED THE CONTENTION THAT METHOD-OF-EXECUTION CHALLENGES ARE RIPE ONLY AFTER THE CONCLUSION OF FEDERAL HABEAS REVIEW

Arthur filed his § 1983 action with unjustifiable delay by filing it approximately a month after the conclusion of federal habeas review. See Arthur at A2 (noting that this Court denied certiorari review on April 16, 2007, and that Arthur filed his § 1983 action on May 14, 2007). The district court stated that "[t]he Eleventh Circuit has declined to determine precisely when such a suit becomes ripe, but it has clearly rejected the notion that denial of certiorari is required." Arthur at 8. This Court, in Jones, Grayson, and Williams, has rejected requests for equitable relief that were filed at or near the conclusion of federal habeas review. This Court should do likewise here.

When Arthur filed his petition for writ of certiorari in this Court on January 11, 2007, it should have been clear to him that a denial of that petition would remove the final obstacle to a lifting of the state-court automatic stay of execution. See Alabama Rules of Appellate Procedure, Rule 8(d)(1).[8] It should have been equally clear that once the Alabama Supreme Court lifted the

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[8] The state-court automatic stay is in place until the death-row inmate exhausts his state and federal appeals. See Rule 8(d)(1), Ala. R. App. P.

automatic stay, Arthur might have as few as 30 days before the date of execution. Id. (requiring the date of execution to be "not less than 30 days" from the date of the order setting the execution date). At the time Arthur filed his petition for certiorari, therefore, he should have been aware, at the very least, that the likely execution of his sentence was rapidly approaching. Instead of diligently filing a method-of-execution claim, Arthur waited an additional four months to file his § 1983 action.

Any contention that a § 1983 action is premature and unripe until the conclusion of federal habeas review is off the mark. Because a § 1983 lawsuit and federal habeas corpus petition are mutually exclusive causes of action, there is no impediment to filing a § 1983 action while state or federal appeals are actively being pursued. See Nelson v. Campbell, 541 U.S. 637, 643 (2004); Hutcherson v. Riley, 468 F.3d 750, 754 (11th Cir. 2006). Issues that are not cognizable in habeas corpus are cognizable under § 1983. Parallel litigation thus poses no difficulty. There can be no serious contention that Arthur's lethal-injection claim is ripe only after this Court denies certiorari on federal habeas review. Arthur's lethal-injection claim was ripe in 2002 when Alabama changed its method of execution to lethal injection. If Arthur had filed his lethal-injection claim in 2006, when other Alabama inmates began filing their lethal-injection claims, his challenge would not have been dismissed on ripeness grounds.

In addition, allowing lethal-injection challenges to be litigated on the merits even if they are filed after the conclusion of federal habeas review would add years to a too lengthy appeals process. The validity of that conclusion should be obvious, but the State offers three recent examples. Danny Bradley filed a § 1983 action on June 26, 2001, at the conclusion of his federal post-

conviction appeals seeking DNA testing. See Bradley v. Nagle, 2:01-cv-01601-SLB (N.D. Ala.). After that complaint was dismissed, the Eleventh Circuit reversed – ruling that claims seeking post-conviction access to biological evidence for DNA testing purposes may be brought in a § 1983 action. Bradley v. Pryor, 305 F.3d 1287, 1290 (11th Cir. 2002). The federal district court recently entered a memorandum opinion denying relief and dismissing Bradley's lawsuit. Bradley v. Nagle, 2:01-cv-01601-SLB (N.D. Ala. March 29, 2007). Bradley has appealed the dismissal of his § 1983 action that was originally filed six years ago.

The second example is Darrell Grayson, who filed a § 1983 action on November 15, 2002, requesting DNA testing. Grayson v. Pryor, CV-02-BE-2800-S. Grayson's lawsuit was dismissed by the federal district court and rejected on appeal by the Eleventh Circuit and this Court. See Grayson v. King, 460 F.3d 1328 (11th Cir. 2006), cert. denied, Grayson v. King, 127 S.Ct. 1005 (Jan. 8, 2007). Grayson's § 1983 action delayed his execution by almost five years.

The last example is David Nelson, who filed a complaint on October 6, 2003, alleging that any use of a so-called "cut-down" procedure would be unconstitutional. Nelson v. Campbell, 2:03-cv-1008-MHT (M.D. Ala.). This Court ultimately reversed the lower courts, ruling that Nelson could challenge the "cut-down" procedure in a § 1983 action. See Nelson v. Campbell, 541 U.S. 637, 124 S.Ct. 2117 (2004). The case was subsequently remanded to the federal district court where it languishes to this day. Each of these three cases delayed an execution of a duly-adjudicated judgment.

Allowing as a matter of course the litigation of § 1983 actions after the conclusion of federal post-conviction will add years to the end of an already too long appeals

process. As previously stated, such a scenario is inconsistent with the requirement stated in Nelson and Hill for courts to determine whether equitable relief should be granted when the inmate unjustifiably delayed in filing the § 1983 action. In other words, an inmate is not automatically entitled to a stay of execution even when filing a § 1983 with unjustifiable delay. In addition, such a delay is inconsistent with the well-settled interest the State has in carrying out its duly-adjudicated judgment. As previously stated, the State's interest in meting out a sentence of death in a timely manner acquires "an added moral dimension" when post-trial proceedings have run their course. See Calderon v. Thompson, 523 U.S. 538, 556, 118 S.Ct. 1489 (1998).

Although this Court has not expressly determined when a method-of-execution becomes ripe, it has implicitly ruled that raising such a challenge after federal habeas proceedings is too late. In Gomez, this Court vacated a stay of execution because, among other reasons, the "claim could have been brought more than a decade ago." Gomez, 503 U.S. at 654, 112 S.Ct. 1652. The Gomez Court also ruled that "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and Harris' obvious attempt at manipulation." Id. Thus, this Court has ruled that waiting until to the conclusion of federal habeas proceedings to file a method-of-execution challenge that has been available for years is too late.

Finally, it is telling that Arthur now attempts to leverage the "hydraulic pressure" of the combination of a late filing and a pending execution to his advantage, when he could have brought this claim years ago. Had Arthur filed this action within two years of his sentence being changed to lethal injection by operation of law, for example, none of these issues would have to be discussed.

The State filed its motion for an execution date at the appropriate time; it was Arthur who failed to bring his civil rights lawsuit at a time that would have allowed full consideration of his claims.

Arthur contends that Panetti v. Quarterman, __ U.S. __, 127 S.Ct. 2842 (2007), further supports his argument that his lethal-injection claim is not ripe until the end of his federal habeas appeals. In Panetti, this Court ruled, among other things, that the habeas petitioner's claim of incompetency to be executed was not barred by the prohibition against successive habeas petitions, see 28 U.S.C. § 2244, given that such a claim is not ripe until the petitioner's date of execution was set and there was the possibility that petitioner's mental capacity had recently further diminished. Id. at 11. The distinctions here should be obvious. First, a competency to be executed claim is naturally based on an inmate's present competency, thus such a claim is only ripe when execution is imminent. Second, Panetti deals with a claim that can be raised in a habeas petition and not a claim that only can be raised in a § 1983 action. See Nooner v. Norris, __ F.3d __, 2007 WL 1964649 at *4 (8th Cir. July 9, 2007) (ruling that Panetti is not applicable to § 1983 lethal-injection challenges).[9]

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[9] Arthur argues that Panetti further supports his appeal because of the Panetti Court's concern that requiring competency claims to be brought early would result in a wave of premature litigation. Here, Arthur argues, inmates may file their lethal-injection claims too early, only to have the results mooted if their sentence is overturned or if Alabama changes its method of execution. But if that was going to happen, it would be happening already. After the Eleventh Circuit's warnings against late-filed claims in Rutherford, Hill, Diaz, Jones, and Grayson, one would think that inmates who are not so far along in the appeal process would be rushing to file their suits. They are not.

On the other hand, Arthur has known since 2002 that he was going to be executed by lethal injection and likewise his opportunity to file a lawsuit challenging Alabama's execution procedures has been available since 2002. For the foregoing reasons, Panetti has no relevance to the issues presented here.

IV. THE DISTRICT COURT AND THE ELEVENTH CIRCUIT CORRECTLY RULED THAT THE BALANCE OF THE EQUITIES TILTS AGAINST ARTHUR

The Eleventh Circuit ruled that the balance of the equities weigh against Arthur because he unjustifiably delayed in filing his lethal-injection challenge. A19-23. Arthur does not contend that this ruling is erroneous. Instead, Arthur raises issues that he did not raise in the courts below.

First, Arthur contends that a stay should be granted because an Alabama legislative oversight committee recently approved a contract between the Alabama Attorney General's Office and Dr. Mark Dershwitz, a University of Massachusetts professor of anesthesiology. In that contract, Arthur contends that Dr. Dershwitz will "review the chemical composition of drugs" administered during a lethal injection. A30-A36 (the contract). Arthur asserts that Dr. Dershwitz will be making recommendations that will result in changes or improvements to Alabama's lethal-injection protocol. Arthur is wrong on his characterization of the contract.

As that contract plainly states, Dr. Dershwitz is employed as an expert witness by the State of Alabama in litigation involving lethal-injection claims brought by

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Instead, like Arthur, they all are waiting until the end of federal habeas review.

inmates. Dr. Derswhitz has prepared an affidavit that the State relied on in a previous case that concluded that "the administration of the medications as described above [i.e., the three-drug cocktail] will, beyond a reasonable degree of medical certainty, result in the rapid and painless death of the inmate." Grayson v. Allen, 2:06-cv-01032-WKW, "Defendants' Opposition To Grayson's Motion for a Stay of Execution" at p. 28. Indeed, Dr. Dershwitz's affidavit, among other things, led the district court in Grayson to rule that "Grayson cannot show a likelihood of success on the merits, much less a significant likelihood." Grayson, 2007 WL 1491009 at *12. Thus, Dr. Dershwitz's "review" has been completed and he has determined that the three-drug protocol will result in the "rapid and painless death of the inmate."

Second, Arthur contends that he should be granted a stay because of the trial that is scheduled for October 3-5, 2007, in the United States District Court for the Middle District of Alabama. See A26-29 (pretrial order in McNair v. Allen and Callahan v. Allen, 06-cv-695-WKW and 06-cv-919-WKW). However, the State has a pending summary judgment motion that will be discussed during a motions hearing that is scheduled for September 25, 2007, at 10:00 a.m., thus it is less than certain that this trial will even take place. The District Judge is expected to issue a ruling on the summary judgment motion this week.

Third, Arthur cites to a few cases that have held other States' execution protocols are deficient. The State responds by quoting from an opinion that considered evidentiary submissions regarding Alabama's execution procedures. The district court in Grayson, the same court hearing the McNair and Callahan cases, based on evidentiary submissions which it termed "substantial" stated the following:

> The court need not make that determination here because Grayson's allegations and evidentiary submissions (which have been substantial, though without the benefit of full discovery) fail to establish the likelihood of success on the merits and, consequently, any further need for a hearing, abridged or otherwise. Grayson's argument on the merits is entirely speculative: " *If* Mr. Grayson is not properly sedated, ... *if* the drugs are not properly prepared, ... *if* the drugs are not properly administered, or *if* the procedure is performed by individuals not properly trained and supervised, Mr. Grayson will suffer irreparable harm in the form of unnecessary and excruciating pain." (Doc. # 48, at 17-18) (emphasis added). What the evidence does *not* establish is relevant to this analysis: (1) any execution "mishap" in an Alabama lethal injection execution; (2) any cruel or unusual pain suffered by an inmate in an Alabama lethal injection execution; (3) any mishap in the delivery or injection of the three-drug mix in Alabama; or (4) any other compelling reason that suggests a substantial risk of cruel and unusual pain in future lethal injection executions in Alabama. Grayson's arguments, and the evidence upon which they are based, do not establish a significant likelihood of success on the merits.

Grayson at *12. None of the new issues raised for the first time in Arthur's petition for certiorari should be

considered. Even if they are, none offers a legitimate reason to grant a stay or to grant certiorari.

CONCLUSION

The petition for writ of certiorari to the [court below] should be granted.

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